87-416

No. 83-416

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES CATHOLIC CONFERENCE and
NATIONAL CONFERENCE OF CATHOLIC BISHOPS,

Petitioners,

vs.

ABORTION RIGHTS MOBILIZATION, INC., and
JAMES A. BAKER, III,
SECRETARY OF THE TREASURY, and
LAWRENCE B. GILLS,
COMMISSIONER OF INTERNAL REVENUE,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

OF THE NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A., THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, THE CHRISTIAN LEGAL SOCIETY, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE LUTHERAN CHURCH-MISSOURI SYNOD, AND THE NATIONAL ASSOCIATION OF EVANGELICALS, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Whether an order holding a major religious body in civil contempt and imposing substantial fines for refusal to comply with massive discovery requests for sensitive internal church records should be vacated for want of subject matter jurisdiction because the plaintiffs lack standing, either as voters or as members of the clergy, to challenge directly the tax-exempt status of the religious body because of its activity in furtherance of sincerely held religious convictions on a matter of public concern.

Whether a major religious body held in civil contempt may be denied standing as a witness to challenge the underlying jurisdiction of the federal court which entered the discovery order and found the church in civil contempt, on the view that "colorable" jurisdiction suffices to postpone consideration of the church's jurisdictional challenge until the requested discovery of the church's records is completed and the underlying action to revoke the tax-exempt status of the church is decided on the merits.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND STATEMENT OF INTEREST OF AMICI CURIAE

At first blush this case seems to be a straightforward matter of standing. Petitioners and federal respondents have suggested that this Court should grant the writ because the rulings of the district court and the court of appeals on standing represent significant departures from the binding precedents of this Court.

Amici curiae are major religious bodies in the United States, or membership organizations concerned with the preservation of religious freedom. Amici express concern that these standing errors have a First Amendment flavor because of their potentially severe impact on the ability of religious bodies to communicate their message freely on matters of public concern. The conferring of standing to challenge the exempt status of a religious body on private third parties who are hostile to the teachings of that religious body represents a serious inroad on the fragile freedoms of all bona fide religious bodies.[1] This negative impact on religious freedom is

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[1] The remedy sought by the plaintiffs is court-ordered revocation of the tax-exempt status of the church. For the reasons argued in the attached brief, amici suggest that the use of the courts to obtain this relief undermines the necessary degree of flexibility required under *Walz v. Tax Commission*, 397 U.S. 664 (1970), where this Court taught that the central meaning of the Establishment Clause is that "no religion be sponsored or favored, none commanded, and none inhibited. . . . Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.*, at 669. It is difficult to conceive of greater authoritarian rigidity than to give to any opponent of the teachings of a religious body access to federal court to seek an injunction to compel the revocation of that church's exemption from the payment of federal income tax and a whole series of cascading events flowing from the loss of that status. With the loss of exempt status under I.R.C. § 501(c)(3), a religious body would not only have to pay taxes on all income, but all contributions to the

demonstrable irrespective of whether the focus of the controversy is, as here, the vexing issue of abortion or is some equally pressing social issue about which a religious body wishes to communicate with the public. It is likewise demonstrable irrespective of the substantive convictions of any religious body on a controversial matter of public concern.

Amici have sought the consent of the parties to participate in this matter by the filing of the attached brief. The petitioners and the federal respondents have granted their consent. The original and a copy of the consent letters of the counsel of record for the petitioners and of the Solicitor General have been submitted to the Clerk of this Court. This motion is required because the private respondents (Abortion Rights Mobilization, et al.) have refused to allow the leaders or representatives of major religious bodies who have signed the attached brief to be heard in this Court on this matter.

Amici are aware that motions for leave to file an amicus brief in advance of the grant of certiorari are disfavored under Rule 36.1 of this Court, but file this motion nonetheless because of the pressing national significance of this case and because of their unique ability to suggest to this Court the impact of this litigation on the autonomy and integrity of all religious bodies, irrespective of their convictions about the ethics of abortion.

As is evident from the statement of interests of the amici in this motion, some of the amici agree with the position of the petitioners on the abortion issue, and others do not.

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church would no longer be deductible by the contributing taxpayer for purposes of federal income tax, I.R.C. § 170(c)(2)(D), federal estate tax, I.R.C. § § 2055(a)(2) and 2106(a)(2)(A)(ii), and federal gift tax, I.R.C. § 2522(a)(2). In addition, most of the states have parallel provisions in their tax codes which incorporate I.R.C. § 501(c)(3) by reference, for purposes of determining the exemption of a religious body from payment of a wide variety of state and local taxes. Some states, moreover, predicate their regulatory authority over an entity seeking charitable contributions on the entity's federal tax-exempt status, conferring, for example, an exemption from annual reporting requirements to groups which are exempt under § 501(c)(3).

Nonetheless, all of the amici are of one mind that in our constitutional order a religious body must be free to address matters of public policy without being subjected on that account to harassing litigation by outsiders. Thus, a church which disagrees with the petitioners on the abortion issue should not be exposed to costly litigation by right to life advocates who might, under the theory advanced by the plaintiffs in the instant case, attack the exempt status of a "pro-choice" church for allegedly excessive involvement in the political order on the opposite side of the abortion issue.

In the view of the amici, this case involves four mistakes. The first two relate to the legal standing of the petitioners and the private respondents. The other two relate to the fragile civil liberty of religious freedom. None of these constitutional errors is "harmless." Each of them merits the attention of this Court. This conclusion is all the more necessary since the case is compounded by a juxtaposition of four serious constitutional errors.

The first standing mistake was the ruling of the district court that the private respondents (plaintiffs below) *have standing*, either as voters or as members of the clergy, to challenge the tax-exempt status of a major religious organization. This mistake enlarges the power of the judiciary and diminishes the role of the executive over the administration of federal tax policy in a manner directly contrary both to the requirements of the constitution and to the clear intent of Congress.

The second standing mistake was the ruling of the court of appeals that the petitioners *lack standing* as witnesses to challenge the subject matter jurisdiction of the federal court to enter a compulsory discovery order against a religious body, and to hold the church in civil contempt for its refusal to comply with the discovery order. This mistake bootstraps the governmental interest in efficient administration of criminal justice into an undifferentiated power over religious bodies in a civil suit, on a record where it is plain that the church had no legal mechanism available to it other than civil contempt in order to seek appellate review of the first standing mistake.

The first mistake relating to religious freedom was the ruling of the district court requiring the petitioners to hand over to the plaintiffs *massive amounts of sensitive internal church records*, including confidential tax returns which the private respondents may not obtain from the federal respondents because Congress has expressly prohibited the executive from disclosing such information to anyone, let alone to the political adversaries of a not-for-profit religious organization. The permissibility of this contempt citation under the facts in this case and under relevant free exercise standards is adequately preserved on this record, but this Court may avoid a decision on this issue by focusing, as the parties themselves apparently prefer to do, on the standing questions. In the event that this court elects this parth, amici urge this Court to make plain that the question of intrusive civil discovery of the internal records of a religious body is reserved, and to refrain from dicta that would serve in any way to diminish the associational privacy of religious bodies by broadening access to their internal records by hostile outsiders.

The second mistake relating to religious freedom involves the raw judicial power of the district court in holding a major religious body in civil contempt and in imposing *fines in the amount of $100,000 per day on the church petitioners* for each day in which they refuse to comply with the court's compulsory discovery order. The permissibility of this contempt citation under the facts in this case and under free exercise standards is adequately preserved on this record, but this Court may likewise avoid a decision on this issue by focusing on the standing questions. In the event that this Court elects this path, amici urge this Court to make plain that the imposition of coercive fines on the magnitude in this case is a reserved question, and to refrain from any dicta that would serve to diminish the legitimate autonomy of religious bodies by expanding judicial power over these bodies where less restrictive alternatives (e.g., certification of the ruling on the standing of the plaintiffs for an interlocutory appeal) would serve any interest which may be asserted on behalf of orderly administration of justice and would obviate inquiry into

whether the interest in behalf of the contempt order in this case was truly "compelling."

The statement of the interest of each amicus participating in this brief follows.

The National Council of Churches of Christ in the U.S.A. [NCC] is a community of thirty-one religious communions numbering over 40 million members. Some of these communions would agree with the views expressed by the petitioners concerning the morality of abortion; some of them would disagree. All of them have agreed, however — through their representatives on the Governing Board of the NCC — in support of religious bodies and all citizen groups to speak and to act on questions of public policy without suffering state-imposed penalties or disabilities. The Governing Board of the NCC has specifically recommended that its member communions not impair the relationships of confidence and trust within the religious community by disclosing to outsiders "the names of contributors, members, constituents . . . [or] personnel files, correspondence or other confidential and/or internal documents or information." The NCC joins this brief in support of the right of a religious body to be free of governmental constraint to disclose such information to hostile outsiders.

The Baptist Joint Committee on Public Affairs [BJCPA] consists of representatives elected by each of eight cooperating Baptist conventions in the United States: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Seventh Day Baptist General Conference; and Southern Baptist Convention. These Baptist groups have nearly 30 million members and reflect the traditional Baptist concern for proper church-state relations. The BJCPA has as one of its mandates the obligation to respond "whenever Baptist principles are involved in, or are jeopardized through, governmental action." Among Baptists, the freedom of the church from entangling relationships with the government is a fundamental and sacred principle.

The Catholic League for Religious and Civil Rights [League] is a civil rights and anti-defamation organization, national in membership, dedicated to the defense of religious liberty and freedom of expression. Although the League does not purport to speak directly as the official voice of a religious body, this case raises substantial questions relating to central concerns of the League's members. When antagonists of a particular church invoke the power of the government to conduct far-reaching and intrusive examination of sensitive internal church documents, religious liberty suffers. When political opponents seek to penalize protected expressive activity crucial to effective church teaching on matters of public concern by maintaining costly and burdensome lawsuits, genuine freedom of expression is chilled and cannot flourish.

The Christian Legal Society [CLS] is a non-profit professional association of 3,500 Christian judges, attorneys, law professors and law students founded in 1961. The Center for Law & Religious Freedom is a division of the CLS founded in 1975 to protect the free exercise of religion, supporting the appropriate accommodation by the state of religious beliefs and practices and the respect for religious rights required by the First Amendment.

The Church of Jesus Christ of Latter-Day Saints [LDS Church] has an international membershp in excess of 6 million members with general headquarters in Salt Lake City, Utah. There are in excess of 8,400 congregations in the United States. In the view of the hierarchical leadership of the LDS Church, viz., The First Presidency and The Quorum of the Twelve Apostles, the instant case raises serious questions as to whether faithful attention was paid to constitutional guarantees of religious freedom. The leadership of the LDS Church also expresses grave concerns as to the consequences of court-ordered opening of sensitive church records as was mandated by the lower court.

The Lutheran Church-Missouri Synod is the second largest Lutheran denomination in North America and the eighth largest Protestant body in the United States. It has approximately sixty-two thousand member congregations

which, in turn, have approximately 2.6 million individual members.

The National Association of Evangelicals, located in Wheaton, Illinois, is a non-profit association of evangelical Christian organizations, including fifty thousand churches from seventy-eight denominations. It serves a constituency of 10 to 15 million people through its commissions and affiliates.

For the reasons stated in this Motion for Leave to File a Brief Amicus Curiae, amici respectfully urge this Court to grant their motion and to grant the petition for certiorari.

Respectfully submitted,

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ARGUMENT

I.

THIS COURT SHOULD GRANT THE WRIT BECAUSE THE SENSITIVE TASK OF REVOCATION OF THE TAX-EXEMPT STATUS OF RELIGIOUS ORGANIZATIONS SHOULD NOT BE ENTRUSTED TO PRIVATE THIRD PARTIES MERELY BECAUSE THEY DO NOT AGREE WITH THE MESSAGE OF RELIGIOUS NOT-FOR-PROFIT ORGANIZATIONS ENGAGED IN PUBLIC STATEMENTS OF MORAL POSITIONS ON A VARIETY OF PUBLIC POLICY MATTERS.

At one level this case is truly one of first impression. For the first time since the founding of the republic a federal district court has found a major religious body, the Roman Catholic Church [church] comprising some 52 million Americans, represented according to their governing polity by the petitioners, in contempt of court. And the district court has imposed significant penalties, in the amount of $100,000 a day for each day's refusal to comply with the discovery requests of the plaintiffs, *Abortion Rights Mobilization, Inc. v. Baker*, 110 F.R.D. 337 (S.D.N.Y. 1986). A. 441-51a.[2] Amici address the national significance of the sweeping discovery order and the contempt citation in Part II B of this brief, *infra*.

At another level this case is but a classic illustration of why there are rules on standing, and of the pernicious consequences of ignoring those rules. The underlying reason for this church's reluctant decision to allow itself to be held in contempt of court is its conviction, based on the advice of its legal counsel,

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[2] In an unreported order on May 9, 1986 the district court stayed the fines imposed in his order of May 8. A. 52a. The court of appeals has also granted a stay during the pendency of the appeal to this Court. A. 105a, 108a.

that the district court lacks jurisdiction over the subject matter, and therefore is without power to enforce the subpoenas duces tecum of the plaintiffs, private third parties who attack the tax-exempt status of the church.

In the view of the amici this case involves two serious mistakes on standing. The first standing mistake was the ruling of the district court that the private respondents (plaintiffs below) *have standing*, either as voters[3] or as members of the clergy,[4] to challenge the tax-exempt status of a major religious organization. (See I A. & I B, *infra*). The second standing mistake was the ruling of the court of appeals that the petitioners *lack standing* as witnesses to challenge the subject matter jurisdiction of the federal court to enter a compulsory discovery order massive in scope against a religious body, and to hold the church in civil contempt for its refusal to comply with the discovery order. (See II A, *infra*).

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[3] In *Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471 (S.D.N.Y. 1981), [*ARM I*] the district court rejected the standing of the plaintiffs to litigate an alleged violation of equal protection on the ground that they could not identify any personal injury district from that of the public generally. *Id.*, 544 F. Supp. at 483. A. 75a-76a. Notwithstanding this finding, the district court ruled (1) that all the individual plaintiffs have standing as voters to litigate an alleged "distortion in the political process" arising from the implementation of federal tax law, and (2) that the plaintiff exempt organizations have standing to represent their members who are voters. *Id.* 544 F. Supp. at 480-482. A. 69a-74a.

[4] The district court denied Establishment Clause standing to the individual plaintiffs and exempt organizatons, *Abortion Rights Mobilization v. Regan*, 544 F. Supp. 471, 478 (S.D.N.Y. 1982) A. 62a-67a, but ruled that the clergy plaintiffs had standing under the Establishment Clause because they had articulated sufficient injury by virtue of the alleged "denigration" of their religious beliefs and "frustration" of these plaintiffs' ministries arising from the "tacit government endorsement of the Roman Catholic Church view of abortion," characterized as governmental "favoritism to a different theology." *Id.*, at 479. A. 67a-69a. Finding "colorable" jurisdiction predicated upon voter standing, the court of appeals declined to rule on the issue of clergy standing.

A. The District Court Erred in Conferring Standing on the Private Respondents (Plaintiffs below) to Challenge the Exempt Status of a Major Religious Organization on the Grounds that the Plaintiffs are Either Voters or Members of the Clergy.

Amici agree with the petitioners and the federal respondents that one reason for granting the writ is that the decisions of the district court and the court of appeals are flatly inconsistent with the binding precedents of this Court on standing.[5] Amici do not address these concerns directly in this brief, but express concern that these standing errors have a First Amendment flavor because of their potentially severe impact on the ability of religious bodies to communicate their message freely on matters of public concern. The conferring of standing to challenge the exempt status of a religious body on private third parties who are hostile to the teachings of that religious body represents a serious inroad on the fragile freedoms of all bona fide religious bodies, irrespective of their convictions on the particular issue of abortion underlying this case.

Like the instant case, *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976) involved a challenge to the tax-exempt status of third party organizations. In *Simon* this Court refused to find a causal link between a revenue ruling under I.R.C. § 501(c)(3) and a reduction in services to indigents, and it ruled that "[i]t is purely speculative whether the denials of service specified in the complaint fairly could be traced to petitioners' encouragement or instead result from decisions made by the hospitals without regard to the tax implications." *Id.* at 42-43. The clear implications of *Simon* were ignored by

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[5] See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975); *United States v. Richardson*, 418 U.S. 166 (1972); and *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S.A. 208 (1972).

the district court, which conferred standing on the private respondents (plaintiffs below) because of their status as voters or as members of the clergy.

(i) Voter standing

In both *Simon* and *Allen v. Wright*, 468 U.S. 737 (1984), this Court established that standing is deficient where a plaintiff challenging the tax status of a third party fails to focus on the conduct of the tax-exempt organization. *Simon*, 426 U.S. at 44-46; *Allen*, 468 U.S. at 757, n. 22. Despite the similarity between these precedents and the instant case, the district court conferred standing on the plaintiffs in their capacity as voters, on the view that they have somehow been disadvantaged by the federal respondents' alleged "preferential treatment" of the church. The fallacious premise for this view appears to be that taxed contributions translate into less voting power than non-taxed contributions. This analysis is flawed for two reasons. First, the plaintiffs have not experienced a cognizable injury in their capacity as voters that supports a grant of Article III standing in this capacity. The actual voting power of each individual plaintiff at the polling place is not in the least restricted by campaign activities whether conducted by taxed or tax-exempt organizations. The participation of the plaintiffs in political life is no less significant than that of other voters, *Baker v. Carr*, 369 U.S. 186, 208 (1962), and is not affected by the granting or revocation of exempt status to the petitioners.

Second, even if it were assumed that plaintiffs had suffered some palpable injury to their rights of franchise, the injury was not caused by the actions of the government, as it was in *Baker v. Carr, supra*, and it is not easily redressable by a court order revoking the tax-exempt status of the petitioners. As this Court held in *Allen*, even if a plaintiff has sustained an injury, standing is still deficient where "the injury alleged is not fairly traceable to the Government conduct . . . challege[d] as unlawful." *Allen*, 468 U.S. at 757. The *Allen* Court reasoned that it was "entirely speculative whether withdrawal of the tax

exemption of racially discriminatory schools would have any impact on the ability of respondents' children to receive a desegregated education." *Id.* at 758. Similarly, the injury to the plaintiffs in the instant case is not traceable to government conduct, and altering that conduct will not redress the alleged injury. Plaintiffs' claimed injury is actually traceable not even to the petitioners, but to third party taxpayers who choose voluntarily to make charitable contributions to the petitioners. The injury claimed is the added influence that the Catholic church has because of the tax-free money that is available to spend on campaigns opposing abortion. It is, however, purely conjectural to believe that taxing these charitable gifts will in any significant way diminish the influence of that church on abortion policy in this country. The church's campaign against abortion is evidently grounded in sincerely held religious beliefs. For this reason it is highly doubtful that the church would decrease its efforts to communicate its teaching on abortion if the district court were to order the federal respondents to revoke the petitioners' tax-exempt status. In short, the claimed injury to voting rights is not cognizable injury which is traceable to governmental action or redressable by a court order.

(ii) Clergy standing

The district court likewise erred in conferring standing on the clergy plaintiffs on the view that the protected activity of the petitioners in exercising rights secured to them under the Free Exercise Clause and the Free Speech Clause (see Part II A or this brief, *infra*) violates the rights of these clergy plaintiffs secured under the Establishment Clause. This conclusion is erroneous for three reasons. First, there is "no principled basis on which to create a hierarchy of constitutional values. . . . " *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 484 (1982). Furthermore, "[t]he proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those

provisions has no boundaries." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974).

Second, the plaintiff must show not mere psychological distress that one's view of the constitutional order has been offended, but direct and palpable injury caused by the illegal conduct of the plaintiff. In *Valley Forge* the Court held that the plaintiffs lacked standing because they "fail[ed] to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Id.* at 485. Noting that the plaintiffs' grievance was "not a direct dollars-and-cents injury but is a religious difference," *id.* at 478, citing *Doremus v. Bd. of Educ.*, 342 U.S. 429 (1952), the Court concluded that the case and controversy requirement may not be dispensed with even "when the underlying merits concern the Establishment Clause." *Id.* at 489. As Chief Justice Rehnquist wrote in *Valley Forge*: "The federal courts were simply not constituted as ombudsmen of the general welfare." *Id.* at 487.

Further support for the proposition that psychological injury is not enough to sustain a finding of standing may be found in *Allen*, 468 U.S. 737 (1984). The Court in *Allen* denied standing to black parents who claimed that they suffered "stigmatic" injury because of the tax-exempt status of segregated private schools. The Court did not consider stigmatic injury of the sort complained of here to be personal injury that is traceable to governmental action or redressable by the court. *Id.* at 754-56.[6]

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[6] Although *Allen* seems plainly to require the result that the private respondents lack standing, the district court in *Abortion Rights Mobilization, Inc. v. Regan*, 603 F. Supp. 970 (S.D.N.Y. 1985), A. 93a-102a, expressly declined to modify its earlier ruling on voter and clergy member standing in the light of *Allen*, even to certify the standing matter for purposes of an interlocutory appeal by the petitioners. The district court's refusal to certify its rulings on this matter for interlocutory appeal triggered the contempt proceedings as the only legal mechanism available to the petitioners to challenge the jurisdiction of the court to order massive discovery of sensitive internal church records. See Part II B, *infra*.

The claimed injury to the clergy in the instant case is indistinguishable from the "psychological" injury found insufficient to confer standing in *Valley Forge* and the "stigmatic" injury addressed in *Allen*. The extent of the "injury" to these members of the clergy is easy to assert, but impossible to measure or to trace. It is difficult to imagine how their ability to minister to their flocks could be affected by the outcome of this litigation. As the diversity among religious bodies included among the amici demonstrates, it is empirically obvious that the moral teaching of various religious bodies on abortion has not been contingent upon teaching of the Catholic church on this matter, let alone on the even more attenuated question of whether that church enjoys tax-exempt status. The implication to thecontrary in the district court's ruling in *ARM I* merely serves to reemphasize the need for rules of standing that prevent the use of federal courts for religion-bashing.

Third, the district court erred in assuming that the grant of tax- exempt status to a religious body constitutes "tacit government endorsement of the Roman Catholic Church view of abortion," A. 67a, or "official approval of an orthodoxy," A. 68a. See *Walz v. Tax Commission*, 397 U.S. 664 (1970).[7] In discharging the task committed to them by Congress, the federal respondents have not "denigrated" the religious beliefs of the plaintiffs who are members of the clergy; nor has the government in any way "frustrated" the ministry of those plaintiffs. Although the plaintiffs who are clergy members may subjectively feel that their beliefs are "denigrated" by the tax-exempt status of the Catholic church, that is not enough to

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[7] Far from requiring that religious organizations would be muffled because of their exempt status, *Walz* assumes that they "frequently take strong positions on public issues." *Id.* at 670. This is true both for petitioners and for the exempt organizations of which the private respondents are clergy members. "Pro-life" and "pro-choice" groups enjoy both exempt status and the right to announce their message to the public.

establish standing under this Court's teaching in either *Simon* or *Allen*. As was suggested above with respect to voter standing, moreover, it is entirely speculative to conclude, as the district court did, that the revocation of the tax-exempt status of a religious body necessarily marks its decline in influence; this belief ignores the myriad of factors that influence the moral livelihood of a religious community.

B. The Private Respondents Lack Statutory Standing because Congress has Entrusted the Sensitive Task of Granting and Revoking the Tax-Exempt Status of Charitable Organizations not to Private Parties, but to Federal Respondents.

The standing requirement limits the jurisdiction of federal courts "to those disputes which confine federal courts to a rule consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 97 (1968).[8] The separation of powers concept imbedded in the standing doctrine, then, admits of a congressional role in expanding the role of the courts, within Article III limits, if it chooses to do so. Far from conferring statutory standing on the plaintiffs in this lawsuit, however, Congress has given several indications in the tax code that support the opposite conclusion.[9] In short,

[8] *Allen, supra* and *Simon, supra* may not adequately be distinguished on the basis of *Flast*, which makes better sense as a precedent for pure Establishment Clause issues (such as the permissibility of tax exemptions for religious bodies, *Walz, supra*) than as a hook for getting at the sensitive internal documents of a religious body by means of "enforcement" proceedings brought not by the government, but by hostile third parties.

[9] In the Anti-Injunction Act, Congress prohibited suits to restrain assessment or collection of any tax, whether brought by a taxpayer or, as here, a third party. I.R.C. § 7421(a). Congress has delegated the administration and enforcement of the tax laws exclusively to the Secretary and the Commissioner. I.R.C. § 7801(a). In addition,

Congress plainly intended the administration of the code, including the granting and revocation of exempt status under § 501(c)(3), to be within the discretion of the federal respondents over whom Congress has a great deal of control through the oversight process, rather than within the boundless imagination of plaintiffs seeking to enforce their notions of tax equity in the federal courts. The consequences of the district court's view of standing, however, is that it undermines the express intent of Congress by allowing private parties and the federal courts to usurp the role of both the legislative and executive branches, contrary to this Court's teaching in *Valley Forge* that Article III power is "not an unconditioned authority to determine the constitutionality of legislative or executive acts." 454 U.S. at 471. It is likewise clear under *Valley Forge* that the plaintiffs do not have "license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." 454 U.S. at 487.

For this reason, even when suits to compel the executive branch to undertake enforcement committed to its discretion are "premised on allegations of several instances of violations of law, [they] are rarely if ever appropriate for federal-court adjudication" *Allen*, 468 U.S. at 759-760. Noting that an agency decision regarding enforcement proceedings "has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the

Congress gave to the federal respondents the power to "prescribe all needful rules and regulations for the enforcement of" those laws. I.R.C. § 7805(a). And Congress reserved for itself the task of overseeing the enforcement of the revenue laws by creating a Joint Committee on Taxation to investigate the administration, operation, and effects of the tax system. I.R.C. § § 8001-8023. These provisions reflect congressional intent to operate the tax system within the legislative and executive branches. Congress, moreover, has expressly mandated that the IRS maintain the confidentiality of tax records, I.R.C. § 6103; and out of concern for the delicate character of religious freedom, Congress has expressly limited the power of the IRS to conduct audits of church bodies. I.R.C. § 7605(c).

Constitution to 'take Care that the Laws be faithfully executed.' U.S. Const., art. II, § 3," *Heckler v. Chaney*, 470 U.S. 821, 832 (1985), this Court has emphasized that executive agency decisions *not to enforce* are characteristically unsuitable for judicial resolution because this discretionary choice "often involves a complicated balancing of a number of factors which are peculiarly within its expertise." *Id.*, 470 U.S. at 831. In the instant case this principle demands reversal of the district court's ruling on standing which removes from the federal respondents delicate IRS decisions that must take into account the protections of the First Amendment and hands them over to litigants who have not shown "a direct dollars-and-cents injury, but [only] a religious difference," *Valley Forge*, 454 U.S. at 478. The likelihood that disgruntled third parties will be sensitive to the free speech and free exercise concerns of non-profit organizatons they oppose is slim. The probability that religious organizations will become the target of third parties hostile to their religious perspective is high.[10]

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[10] The standing rule adopted by the district court would do little to safeguard the core meaning of the Establishment Clause, and could easily open up the floodgates to litigation against churches by those hostile to their mission or ideas. See, e.g., *Khalaf v. Regan*, 85-1 U.S. Tax Case ¶ 9269 (D.D.C. 1983) (dismissing on standing principles effort of anti-Zionist organization to revoke exempt status of Jewish charitable organizations because of their support of Israel); *American Society of Travel Agents, Inc. v. Blumenthal*, 566 F. 2d 145 (D.C. Cir. 1977), cert. denied, 435 U.S. 947 (1978) (dismissing on standing principles attack on exempt status of American Jewish Congress by business competitors). The potential for mischief of this sort, moreover, is not limited to religious not-for-profit organizations, but could readily affect exempt charitable organizations which are secular in character. For example, a member of the Ku Klux Klan who is a registered voter could hypothetically sue the Secretary of the Treasury to revoke the exempt status of the NAACP if the civil rights education fund were to participate in voter education deemed impermissible under the restrictive regulations in Rev. Rul. 78-248 (construing § 501(c)(3) to prohibit distribution of accurate information to voters if the voter guide focuses on a single issue such as land conservation). Similarly, opponents and proponents of gun control could use the courts rather than the halls of Congress and other legislative chambers to carry on their debates. Even if their suits were ultimately dismissed on the merits, they would have succeeded in obtaining valuable information about their opponents that would otherwise be unavailable to them.

Even if such suits are eventually decided on the merits in favor of the religious body attacked by private parties in the court, significant harm to religious freedom may result, as this record illustrates, from subjecting the religious body to inquiries which violate the legitimate autonomy of the religious body. (See II B, *infra*) At the very least such intrusions cannot be justified on the basis of protecting litigants whose tax liability is not even affected. Fot these reasons, this Court should grant the writ in order to reverse the district court's erroneous ruling on standing.

II

THIS COURT SHOULD GRANT THE WRIT BECAUSE THE DECISION OF THE COURT OF APPEALS UNDERMINED THE ABILITY OF A MAJOR RELIGIOUS ORGANIZATION TO CHALLENGE THE POWER OF A FEDERAL COURT TO IMPOSE SUBSTANTIAL FINES ON THE CHURCH FOR ITS REFUSAL TO HAND OVER EXTENSIVE INTERNAL DOCUMENTS RELATING TO PASTORAL PLANS TO ENGAGE IN CONSTITUTIONALLY PROTECTED ACTIVITY THROUGH MORAL ADVOCACY ON MATTERS OF PUBLIC CONCERN PRESENTED TO THE ELECTORATE FOR THEIR DELIBERATON AND DECISION.

A. Where a Major Religious Body was Held in Civil Contempt as a Witness in Exemption-Revocation Proceedings Initiated by Outsiders Hostile to its Message on a Matter of Public Concern, the Court of Appeals Erred in Denying the Church Standing to Challenge the Underlying Jurisdiction of the District Court to Order Discovery of Sensitive Internal Documents, on the View that "Colorable" Jurisdiction Suffices to Postpone Consideration of the Church's Jurisdictional Challenge until the Requested Discovery of the Church's Records is Completed and the Underlying Action to Revoke the Tax-Exempt Status of the Church is Decided on the Merits.

The second standing mistake was the ruling of the court of appeals that the petitioners *lack standing* as witnesses to challenge the subject matter jurisdiction of the federal court to enter a compulsory discovery order against a religious body, and to hold the church in civil contempt for its refusal to comply with the discovery order. *In re United States Catholic Conference*, 824 F. 2d 156 (2d Cir. 1987). A 1a-43a.[11] In reaching this result, the court of appeals virtually ignored the recent teaching of this Court in *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 106 S.Ct. 1326 (1986), that "*every* federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review . . . .' " 106 S.Ct. at 1331 (emphasis added). Thinking that this rule is inapplicable to interlocutory appeals, the court of appeals devised a new rule of standing, according to which the petitioners' challenge to the power of the district court to order massive discovery of the sensitive internal documents of a major religious body and

[11] On this record it is plain that subjecting itself to a civil contempt citation was the only available legal mechanism to seek appellate review of the first standing mistake "before undertaking any burden of compliance with the subpoena." *United States v. Ryan*, 402 U.S. 530, 533 (1971). See note 6 *supra*.

to hold it in contempt for failure to comply with this request must fail if the appellate tribunal finds a modicum of "colorable" jurisdiction in the lower court. The court of appeals justified this conclusion by extensive reliance on *Blair v. United States*, 250 U.S. 273 (1919), a case involving a challenge to the authority of the grand jury in a criminal investigation. Amici intimate no view as to whether the *Blair* rule is still required to serve the governmental interest in efficient administration of criminal justice. Amici urge, however, that it makes little sense to extend the rule into an undifferentiated power of private plaintiffs over religious bodies in a civil suit, especially where the government does not assert the interest at issue in *Blair*.[12]

Even if this case were a criminal prosecution of a bogus "church," the normal rule for the judiciary would be to defer to the discretion of the executive in conducting the prosecution. See, e.g., *United States v. Cox*, 342 F. 2d 167 (5th Cir. (1965) (en banc), cert. denied, 381 U.S. 935 (1965)). But this is not a case in which the government is aligned againt a religious body because of an alleged violation of the tax code. See, e.g., *Bob Jones University v. United States*, 461 U.S. 574 (1983). It is a case in which private parties seek to use the federal courts to inflict a penalty on a major religious body for the evident reason that they disagree wih the moral teaching of that church on a controversial matter of public concern. Under these circumstances and in the light of *Heckler v. Chaney*, *supra*, this case is hardly an apt vehicle for extending the reach of the *Blair* rule to religious bodies which choose to speak out on matters of conscience which are controversial in nature.

[12] In this case the federal respondents agree with the petitioners that the district court lacks subject matter jurisdiction. Indeed, the government has sought review of this very issue in the court of appeals and this Court on repeated occasions. See, e.g., Briefs of the United States in Nos. 86-157 and 86-162.

B. The Ability of a Religious Organization to Engage in Protected Activity is Severely Chilled when Federal Courts Impose Substantial Penalties on the Church for Failure to Comply with unduly Burdensome and Overbroad Subpoenas Seeking Extensive Discovery of Internal Records of the Pastoral Plans of the Church

(i) Communicating sincerely held religious convictions on matters of public concern is protected activity.

Amici do not claim that when religious organizations choose to "enter a public forum and spread their view," *Heffron v. ISKCON*, 452 U.S. 640, 653 (1981), they are always entitled to protection greater than that enjoyed by non-religious social or political organizations. By the same token, however, religious bodies are surely entitled at the very least to no lesser degree of protection than that enjoyed by their secular counterparts. See, e.g., *McDaniel v. Paty*, 435 U S. 618, 640 (1978) (Brennan, J., concurring). It is likewise clear that special concerns of religious autonomy and integrity arise when the government seeks to regulate a religious body which are not present when it seeks to regulate a secular organization. See, e.g., *Corp. of Presiding Bishop v. Amos*, 480 U.S. ___, 107 S.Ct. 2862, 2871 (1987) (Brennan, J. concurring); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). And see Laycock, "Towards a General Theory of the Religion Clauses," 81 *Colum. L. Rev.* 1373 (1981).

Amici are of the view that restrictions on the political speech of religious organizations in § 501(c)(3) are deficient because they are by no means the alternative least restrictive of their rights secured under the Religion Clause and the Free Speech Clause. Indeed, it is difficult to imagine a restriction more total than the "absolute prohibition" on *any* participation by a 501(c)(3) organization in a political campaign whether on behalf of or in opposition to a candidate for public office. See, e.g., IRS Exempt Organizations Handbook (IRM 7751) § 3(10)1; and see Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii). It is

likewise hard to imagine that IRS rulings virtually prohibiting voter education efforts by exempt organizations on topics of concern to the organization, see, e.g., Rev. Rul. 78-160, 1978-1 C.B. 153, revised by Rev. Rul. 78-248, 1978-1 C.B. 1545, and Rev, Rul. 80-282, 1980-2 C.B. 178, would pass muster in judicial review that took seriously the mandate of *New York Times v. Sullivan*, 376 U.S. 254 (1964), that debate on issues of public concern must be "uninhibited, robust, and wide-open." *Id.* at 270. See generally, Caron and Dessinque, "I.R.C. § 501(c)(3): Practical and Constitutional Implications of 'Political' Activity Restrictions," 2 *J. of L. and Politics* 169 (1985) and literature cited *id.* at 180, n. 40, at 181, n. 41, and at 183 n. 54.

In another case before this Court during this Term amici have expressed their views that the Religion and Free Speech Clauses afford substantial protection against extensive governmental regulation of a religious body which chooses to announce sincerely held religious beliefs that relate directly to matters of public concern. See Amicus Brief of Baptist Joint Committee on Public Affairs in *Bemis Pentecostal Church v. State*, app. pending, No. 87-317. Without repeating those arguments here, amici note that public communication of sincerely held religious convictions on matters of public concern is protected activity.[13] For example, amici and the representatives of a host of other denominations and religious bodies are called upon regularly to express the views of religious groups on a wide variety of social and political issues with pressing ethical components. In testimony before the House Ways and Means Committee in 1972, Dr. J. Elliott Corbett of the United Methodist Church entered into the record of these hearings a policy declaraton of his church

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[13] Since this is true for religious groups on both sides of the abortion issue, it was error to confer standing on clergy members on the view that the exempt status of the petitioners somehow "frustrated" their ministry.

which bespeaks the impossibility of any total severance of religion and politics in our society:

> "We believe that churches have the right and the duty to speak and act corporately on those matters of public policy which involve basic moral or ethical issues and questions. Any concept of church-government relations which denies churches this role in the body politic strikes at the very core of the religious liberty. The attempt to influence the formation and execution of effective means available to churches to keep before modern man the ideal of a society in which power [is] made to serve the ends of justice and freedom for all people." *Legislative Activity By Certain Types of Exempt Organizations*, Hearings Before the House Ways and Means Committee, 92d Cong., 2d Sess. at 303, 305 (1972). See also, *Influencing Legislation by Public Charities*, Hearing Before the House Ways and Means Committee 94th Cong., 2d Sess. (1976).

(ii) The scope of requested discovery is overbroad.

The means selected by the plaintiffs to achieve their goal in the instant litigation includes sweeping discovery requests that threaten the impairment of the integrity and autonomy of religious bodies. The standing issue is intimately connected with the threat to religious autonomy posed by the discovery requests, for a court without jurisdiction over the subject matter clearly lacks authority to enforce subpoenas for production of documents, whether the subpoenas are narrow or broad. Amici are particularly troubled that this case might turn into an inadvertent precedent damaging the autonomy of religious bodies. Hence amici urge this Court to focus particular attention on the intrusive character of the excessively broad discovery requests in the instant case and the potiential chilling effect that granting such requests entails for similarly situated religious bodies.

Even if the district court had jurisdiction over the subject matter, the district court nonetheless erred in ordering massive compulsory production of internal church documents to a private third party and extensive depositions of church officials and employees.[14]

In the view of amici, the plaintiffs' discovery requests are seriously intrusive upon the autonomy and integrity of religious bodies. In the process of attempting to prove their case on the merits, attorneys for the plaintiffs have proceeded against the petitioners with discovery requests that seek to examine in depth and in great detail virtually all significant relationships between Roman Catholic institutions at all levels and the entire political process. The subpoenas duces tecum addressed to the petitioners demand production of voluminous material including internal church discussions regarding the formulation and implementation of the Catholic Bishops' position on one of the vexing and fundamental religious and political issues of our time, abortion.

If this Court sustains these subpoenas, the impact of this decision on the amici and similarly situated religious bodies could be staggering, for there would be no principled way to differentiate between the plaintiffs in the instant case and opponents suing the government to secure a judicial order revoking the tax-exempt status of another religious body because of that body's political involvement on any number of the other issues designated by the Catholic Bishops as "pro-life" matters (e.g., nuclear war, capital punishment, adequate health care, foreign policy and immigration policies relating to Latin America or South Africa). Once such a plaintiff hostile to a church's moral teaching on any one of these themes had commenced an action like the instant case, the door would be wide open to dissipate the resources of a not-for-profit

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[14] For a description of the subpoenas, see Petition for Certiorari, at 6-7. A more extensive and detailed description of the subpoenas, with references to the pages in the Appendix below, is found in the Appellants' Brief before the court of appeals, pp. 9-12.

corporation dedicated exclusively to religious purposes. Whatever may be said of the permissibility of the restraints on political speech contained in I.R.C. § 501(c)(3), Congress surely never contemplated nor intended the result of costly litigation against religious bodies initiated by private third parties.

This Court, however, need not support the district court's order for such broad discovery against a non-party, for the plaintiffs' discovery rights are predicated upon the ground that its claims are not without merit. See, e.g., *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). Federal courts have denied discovery altogether where no proof of facts in support of a claim would entitle the party seeking discovery to relief. See, e.g., *Westminster Investing Corp. v. G.C. Murphy Co.*, 434 F.2d 521 (D.C. Cir. 1970). Plaintiffs ground their cause of action: (a) on the view that as members of the clergy their religious convictions have been "denigrated" by an official policy of preferential treatment of the petitioners over other religious bodies who disagree with the petitioners on the issue of abortion, and (b) on the view that as registered voters they have suffered a diminution of the strength of their franchise because of alleged governmental "subsidy" of the petitioners. As was argued above, neither of these claimed bases for standing is significantly different from the bases asserted by the plaintiffs in *Allen v. Wright*, 468 U.S. 737 (1984). Furthermore, the interest of the plaintiffs in securing access to documents which could lead to discovery of relevant evidence must be shown to be greater than the legitimate First Amendment interests of the non-parties against whom discovery is sought. See, e.g., *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981) (discovery of confidential news sources favored where a journalist is a party and is disfavored where he is not a party). Obviously greater protection should be afforded to a non-party, where the discovery excessively burdens delicate First Amendment rights that need "breathing space." *NAACP v. Button*, 371 U.S. 415 (1963). For these reasons, the legal predicate underlying the plaintiffs' discovery requests is seriously flawed, and their subpoenas should not be enforced.

(iii) The penalties imposed on the petitioners are excessive because certification is an equally effective alternative less restrictive of religious autonomy.

It is well settled that religious bodies are afforded additional constitutional protection precisely because of their religious character. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The freedom of religious bodies to address many vexing social problems from a religious perspective should not be conditioned upon their compliance with overbroad and intrusive discovery orders. Nor should religious bodies be subjected to excessive sanctions for seeking appellate review of the underlying power of the court to isssue such orders, unless the government can demonstate that it has utilized the least restrictive means of acieving a truly compelling governmental interest. *Hobbie v. Unemployment Appeals Commission*, 480 U.S. ___, 107 S.Ct. 1046, 1094 (1987); *Thomas v. Review Board*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963).

In the instant case, the district court plainly had such an alternative readily available. All of the painful confrontation between the judiciary and a major religious body over the past year and a half could have been avoided by certifying the ruling on standing for purposes of interlocutory appeal under 28 U.S.C. § 1292(b). Where the delicate issue of religious freedom hangs in the balance, the refusal of the district court to certify this standing ruling, even after the plain teaching of this court in *Allen*, constitutes an abuse of discretion so significant that this Court should grant the writ in order to reverse the district court on this matter.

The permissibility of the contempt citation imposed upon the petitioners under the facts in this case and under free exercise standards is adequately preserved on this record, but this Court may likewise avoid a decision on this issue by focusing on the standing questions. In the event that this court elects this path, amici urge this Court to make plain that the imposition of coercive fines of the magnitude in this case is a

reserved question, and to refrain from any dicta that would serve to diminish the legitimate autonomy of religious bodies by expanding judicial power over these bodies where less restrictive alternatives (e.g., certification of the ruling on the standing of the plaintiffs for an interlocutory appeal) would serve any interest which may be asserted on behalf of orderly administration of justice and would obviate inquiry into whether the interest protected by the contempt order in this case was truly "compelling."

CONCLUSION

For the reasons set forth in this brief, amici urge this court to grant the writ of certiorari sought by the petitioners and the federal respondents and to reverse the judgment of the court of appeals denying standing to the church witness to challenge the jurisdiction of the federal courts to entertain lawsuits by private parties opposed to the social message of the petitioners. Amici likewise urge this court to correct the error of the district court in *ARM I* that any of the plaintiffs have standing.

In the view of the amici the burden of compliance with the district court's order of massive discovery of sensitive internal church records likewise constitutes a grave threat to the legitimate autonomy of religious bodies in our constitutional order. In the event that this court decides to limit the grant of the writ exclusively to the standing issues, amici urge this Court to make plain that it has reserved the issues of the permissible scope of compulsory civil discovery of the internal records of a religious body, and of the imposition of substantial penalties on a religious body where a less restrictive alternative is available.

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PROOF OF SERVICE BY MAIL

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I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Los Angeles, California 90025; that on October 22, 1987, I served the within *Motion For Leave To File Brief Amicus Curiae and Brief Amicus Curiae* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on October 22, 1987, at Los Angeles, California.

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